

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

JOHN D. MERWIN, II, M.D.

Appellant

v.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS

Respondent

DOCKET NUMBER WD75508

DATE: May 7, 2013

Appeal From:

Circuit Court of Cole County, MO
The Honorable Jon Edward Beetem, Judge

Appellate Judges:

Division Two
Karen King Mitchell, P.J., Thomas H. Newton, and Lisa White Hardwick, JJ.

Attorneys:

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MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

JOHN D. MERWIN, II, M.D., Appellant, v. STATE BOARD OF
REGISTRATION FOR THE HEALING ARTS, Respondent

WD75508

Cole County

Before Division Two Judges: Mitchell, P.J., Newton, and Hardwick, JJ.

Merwin, an anesthesiologist, called his supervisor at a medical group and informed him that he could not show up for work because he was hallucinating due to alcohol use. Merwin later returned to work on the condition that he abide by an agreement to complete an alcohol treatment program. Merwin at some point left the treatment program and the supervisor suspended Merwin. Merwin unsuccessfully attempted to locate an alternative treatment program. A month later, he resigned his position with the medical group. He sought other employment as an anesthesiologist and did not inform his subsequent employer that he left the medical group because he failed to complete a treatment program. After an investigation and hearing, the Board petitioned the AHC to discipline Merwin's license. At the AHC hearing, Merwin disputed that his hallucinations were due to his use of alcohol rather than his insomnia caused by his nonuse. The AHC found that the evidence supported two grounds for discipline and the Board subsequently disciplined Merwin by probating his license for five years, during which he could practice if he participates in a treatment program, abstains from alcohol and drug use, and submits to drug tests. Merwin petitioned for judicial review. The circuit court found that the evidence supported only one of the grounds for discipline. Merwin appeals.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Division Two Holds:

In his first point, Merwin argues that the AHC erred in finding that the evidence supported a finding that he violated a rule against using alcohol to the extent that it impairs a physician's ability to perform the work of his profession. Specifically, Merwin argues that the AHC erroneously interpreted the rule and that the evidence did not support a finding that he violated the rule. In a previous decision by this court, *Koetting v. State Board of Nursing*, 314 S.W.3d 812 (Mo. App. W.D. 2010), we found that a similar rule was applicable to off-duty alcohol use by a nurse that caused her absenteeism. First, we believe that the rule interpretation in *Koetting* applies to this case and the AHC's interpretation of the rule is in line with *Koetting*. Second, the evidence was sufficient to show that Merwin missed several days of work because of his alcohol consumption in that he failed to satisfy the terms of the agreement with the medical group. Merwin's first point is denied.

In his second point, Merwin argues that the AHC erred in finding that the evidence supported a finding that he violated the rule against engaging in unprofessional conduct in the performance of professional functions because he failed to disclose his reason for leaving the medical group. Specifically, Merwin argues that the AHC erroneously interpreted the rule and the evidence did not support a finding that he violated the rule. The duty of candor relied on by

the AHC to find Merwin violated this rule was not shown to be violated. The rule implicitly requires that the unprofessionalism have to be foreseeable. No evidence was adduced that Merwin was dishonest about or misrepresented his reason for leaving. Thus, we do not see the unprofessionalism in failing to disclose such information under these circumstances when the hospital is required to conduct a thorough investigation of any doctor before it grants a doctor staff privileges. Merwin's second point is granted.

Therefore, the AHC's decision is affirmed in part, reversed in part, and remanded to the Board to reconsider its discipline in light of our reversal of one of the grounds.

Opinion by Thomas H. Newton, Judge

May 7, 2013

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